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In the Supreme Court of the United States

OCTOBER TERM, 1991

DOMINIC SENESE AND
JOSEPH TALERICO, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the decision by union officials, appointed pursuant to a consent decree settling litigation between the union and the United States, to enforce provisions of the union constitution against petitioners is governmental action in violation of the First and Fifth Amendments to the Constitution.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-25) is reported at 941 F.2d 1292. The district court's opinion entered on August 27, 1990 (Supp. App. 1-47), is reported at 745 F. Supp. 908, and the district court's supplemental opinion entered on December 28, 1990 (Supp. Pet. App. 48-61), is reported at 753 F. Supp. 1181.

JURISDICTION

The court of appeals' order was entered on August 6, 1991. The petition for a writ of certiorari was filed on October 30, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. Pet. App. 4. The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. See *United States v. IBT*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. Pet. App. 4-5; C.A. App. A135-A165 (text of consent decree).

The principal goal of the settlement and consent decree is to wrest the union from the influence of organized crime and establish a new system of rank-and-file elections of IBT officers. Supp. App. 3; Consent Decree 2; *United States v. IBT*, 931 F.2d 177, 180-181 (2d Cir.); *United States v. IBT*, 764 F. Supp. 787, 788 (S.D.N.Y. 1991), aff'd mem., 940 F.2d 648 (2d Cir.), cert. denied, 112 S. Ct. 76 (1991). As provided by the consent decree, the district court appointed three officers from a list of names jointly submitted by the parties: an Independent Administrator, an Investigations Officer and an Elections Officer. Pet. App. 5. These officers exercise powers delegated to them by union officials under the terms of the settlement. The Independent Administrator oversees the activities of the other two officers and the union's internal disciplinary affairs. Pet. App. 5, 12. The Investigations Officer investigates and prosecutes disciplinary charges against IBT members for violations of the union constitution. The Election Officer is

responsible for oversight and certification of the 1991 election process. Pet. App. 5-6. The IBT pays the salaries of the court-appointed officers and provides their office space. Pet. App. 13. The authority of the three officers, with certain limited exceptions, will expire in 1992, after certification of the results of the recent election for union officers. Consent Decree 3.

Under the decree, a party facing a disciplinary charge brought by the Investigations Officer has the right to notice and a hearing before the Independent Administrator. Consent Decree 9. The hearings are conducted in the same manner as labor arbitration proceedings. Supp. App. 7. The Administrator's decision is then subject to review by the district court. Consent Decree 10. The decree states that in reviewing such decisions, the district court shall apply the same standard of review a federal court applies to administrative decisions under the Administrative Procedure Act. *Id.* at 25.

The consent decree enjoins any union member from knowingly associating with "any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonnano Organized Crime Family of La Cosa Nostra, [and] any other Organized Crime Families of La Cosa Nostra or any other criminal group." Consent Decree 6. The consent decree specifically provides that "[t]he IBT Constitution shall be deemed and hereby is amended to incorporate and conform with all of the terms set forth in this order." Consent Decree 5.

2. The Investigations Officer filed disciplinary charges against petitioners for violation of Article II,

§ 2(a) of the IBT Constitution, which has long required every member to conduct himself in a manner which will not "bring reproach upon the union." Pet. App. 6 & n.1. The charges were based, in part, upon petitioners' knowing association with the members of La Cosa Nostra. Charges against petitioner Talerico were also based upon his unlawful refusal to answer questions before a federal grand jury investigating "skimming" from a Las Vegas casino. Talerico served time in prison for civil and criminal contempt resulting from his refusal to testify. Pet. 6-11; Supp. Pet. App. 34-35.

Petitioners sought a hearing before the Independent Administrator (IA). The IA held a hearing, and after review of the record and memoranda submitted by counsel, issued a 42-page opinion sustaining the charges against petitioners. Pet. App. 7-8. He found that petitioners' knowing contacts with organized crime figures were "purposeful and not incidental or fleeting." C.A. App. A1201. As to Talerico, the IA relied in particular on evidence that Talerico had traveled on a number of occasions under an assumed name to meet an organized crime figure and exchange packages or envelopes with him. C.A. App. A1205. In addition, the IA emphasized that Talerico's "refusal to testify was especially iniquitous" because Talerico had previously been granted immunity. C.A. App. A1196. As to Senese, the IA found, based on a review of the extensive evidence (C.A. App. A1188-A1190), that Senese "was and is a member of La Cosa Nostra and that Senese has knowingly associated with members of La Cosa Nostra." C.A. App. A1192. As a sanction for violation of the IBT Constitution, the IA expelled petitioners from the IBT and prohibited them from drawing any funds from the IBT or its affiliates. Pet. App. 8.

3. The IA's decision was submitted to the district court for review. The district court determined that the sanction was both supported by the evidence and consistent with the IBT Constitution. Supp. App. 28-47. The district court also rejected petitioners' contentions that the sanction violated their First Amendment freedom of association rights and their Fifth Amendment due process rights. Citing the fact that the union's stated policy, embodied in the consent decree, was to be free of organized crime influence (Supp. App. 12), the court held that a union can sanction its members for knowingly violating such a policy. The court also found that the consent decree "created no new standards of conduct for IBT members," but rather put into effect a long-standing policy of both the IBT and of the AFL-CIO, with which the IBT is affiliated, "to be free of all corrupt influence." Supp. App. 17. Any past laxness in enforcing that policy did not deprive petitioners of fair notice that associating with organized crime figures violated union standards of conduct. Supp. App. 18.

4. The United States Court of Appeals for the Second Circuit affirmed. The court rejected petitioners' constitutional challenges on two independent grounds. First, the court held that the disciplinary actions of the court-appointed officials did not constitute governmental action subject to constitutional constraints. Pet. App. 11-17. The court found that the actions of the Investigations Officer and the IA were based upon the IBT Constitution, not any state or federal authority, and therefore did not constitute governmental action under this Court's precedents. *Ibid.*

Second, the court of appeals held that, even if the administration of internal union disciplinary proceed-

ings could be characterized as governmental conduct, petitioners had not alleged any actions in violation of the First Amendment or the Due Process Clause. Pet. App. 17. The court held that petitioners' First Amendment right to associate with known members of organized crime did not outweigh the need of both the union and the public to eliminate the influence of organized crime on labor unions. Pet. 17-19. The Court further found that the claim that it violated due process to punish petitioners for their pre-decree association with organized crime was "meritless." Pet. App. 20. The court of appeals agreed with the district court's conclusion that the decree "simply made explicit the longstanding goal of the IBT to be free of corruption," *ibid.*, and observed that the petitioners did not dispute the fact that the evidence that formed the basis for the disciplinary sanctions was reliable. Pet. App. 21.

ARGUMENT

1. The court of appeals' fact-specific conclusion that the IA's enforcement of provisions of the IBT constitution against petitioners was not governmental action is fully supported by this Court's precedents and is not in conflict with the decision of any other court of appeals. Further review is unwarranted.

The United States Constitution's protections of individual liberties and due process apply only to action by the government. *E.g., Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082 (1991). There is no "state action" to trigger the application of these constitutional rights unless there has been a misuse of power "possessed by virtue of state [or federal] law and made possible only because the wrongdoer is clothed with the authority of state [or federal] law."

West v. Atkins, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Moreover, the party charged with deprivation of a constitutional right “must be a person who may fairly be said to be a state actor.” *West v. Atkins*, 487 U.S. at 49 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

The present case involves neither the use of governmental authority nor the action of governmental actors. The sanctions at issue here were imposed in the course of an internal union disciplinary proceeding arising out of petitioners’ violations of the union’s constitution. Petitioners were not charged with violations of any provision of federal law. Pet. App. 6-8. The procedures used to sanction petitioners were specified by the union constitution as modified by the terms of the union’s settlement reflected in the consent decree. See Consent Decree 5. The court of appeals correctly determined that internal union disciplinary proceedings cannot be characterized as state action under this Court’s precedents. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Nor is the IA a state actor. He was selected pursuant to the terms of a settlement agreement between the union and the United States and is not an employee of the United States. He is paid by the union and works in office space provided by the union. Pet. App. 13. And he exercises powers delegated by union officials and conferred by the union constitution, as modified by the consent decree. See *United States v. IBT*, 905 F.2d at 622.¹

¹ Petitioners attempt to cast doubt on whether the consent decree was binding on them and whether it was properly made

Petitioners' reliance upon this Court's recent decision in *Edmonson v. Leesville Concrete Co., supra*, is misplaced. Pet. 12-13. In *Edmonson*, this Court held that peremptory challenges exercised by a private party in a civil case amounted to state action because the jury selection process involves the "performance of a traditional function of government," the resultant jury is a "quintessential governmental body," and the power to challenge a juror could not exist "absent ~~tof~~ overt, significant assistance" from the government. 111 S. Ct. at 2084-2085. The Court analogized the exercise of peremptory challenges by attorneys for the parties to the delegation to a private party of the authority to choose a government employee or official. *Id.* at 2085.

In stark contrast to *Edmonson*, the union disciplinary proceedings at issue in this case do not involve any governmental function, the exercise of any governmental powers, or the delegation of any governmental authority. Nor does the fact that the disciplinary charge at bar was brought by an official selected pursuant to a consent decree alter that conclusion. Petitioners were charged, tried, and sanctioned in accordance with procedures that the IBT voluntarily and effectively made part of the IBT con-

part of the IBT constitution. Pet. 15-16, 18-21. Those issues have already been fully litigated. The district court resolved that the clear terms of the decree amended the IBT constitution to incorporate the terms of the decree. *United States v. IBT*, 764 F. Supp. 787 (S.D.N.Y. 1991). The Second Circuit affirmed, and this Court denied certiorari. 112 S. Ct. 76 (1991). Further, the Second Circuit has repeatedly held that the decree, and the resultant amendments to the IBT Constitution, are binding upon the union membership and officers. See *United States v. IBT*, 931 F.2d at 184-187; *United States v. IBT*, 905 F.2d at 622-623.

stitution. The federal government is no more responsible for the application of those procedures than it is for the subsequent conduct of any litigant who has been sued by the federal government and agreed to reform its practices to settle the lawsuit. Incidental federal involvement in matters pertaining to the officers appointed under the consent decree, such as the availability of district court review of disciplinary decisions, does not transform the IA's discretionary exercise of power under the union constitution into governmental action. See, e.g., *Polk County v. Dodson*, 454 U.S. 312 (1981); *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968) ("the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury").

2. The court was also correct in its alternative holding rejecting the constitutional claims asserted by petitioners.

a. Petitioners argue that expelling them from the union because of their ties to organized crime violated their First Amendment right to freedom of association. Pet. 17-19. Petitioners do not dispute the IA's factual findings regarding the nature of their association with organized crime: Senese "was and is a member of La Cosa Nostra" and Talerico traveled under an assumed name to meet an organized crime figure to exchange packages or envelopes on a number of occasions. C.A. App. A1192, A1205. Petitioners were union officers and, as the court of appeals recognized, the union and the public at large have a strong interest in enforcing codes of conduct designed to wrest the IBT from the control of organized crime. That interest more than outweighs petitioners' purported "right" to exercise power as union officials

while engaging in extensive association with known members of organized crime. Pet. App. 17-18.

b. The courts below were also correct in rejecting petitioners' contention that the sanction violated their Fifth Amendment due process rights. Petitioners, who were represented by counsel throughout the disciplinary proceeding, were provided with notice of the charges against them and four months to prepare for the hearing on those charges. U.S. C.A. Br. 32. They were also supplied with copies of the written testimony and exhibits that the Investigations Officer intended to use at the hearing. *Ibid.* After the hearing, the IA issued a thorough decision explaining why petitioners' conduct violated the IBT constitution. Pet. App. 7-8; Supp. App. 19-25. The district court found that the hearings were conducted in the same manner as labor arbitration proceedings, that the decision was supported by sufficient evidence, and that the sanction was authorized by the union constitution. Supp. App. 7, 28-46. The conclusion of both courts that the procedures used in petitioners' hearing comported with due process standards was correct and would not in any event warrant further review.

Petitioners argue that it was unfair to expel them for their past associations with organized crime. Pet. 24-25. However, as the courts below explained, the consent decree merely "made explicit the longstanding goal of the IBT to be free of corruption." Pet. App. 20; see also Supp. App. 13-18. Petitioners, as union officials, had ample notice that those associations could, in the terms of the IBT constitution, "bring reproach upon the Union." Pet. App. 6 n.1. Past laxness in enforcing the union policy could not disable the union from instituting more thorough enforcement when its enforcement machinery was invigorated by the consent decree.

3. Petitioners do not assert that the decision of the court of appeals conflicts with any ruling of any other court of appeals. Moreover, the issues presented by petitioners are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the court-appointed officers, with certain limited exceptions, will expire this year, after the 1991 union election results are certified. Consent Decree 3. This case thus presents no issue of continuing importance warranting further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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